No. 89-1657

IN THE

Supreme Court of the United States

October Term, 1989

DUANE JOSEPH TILLIMON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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Now comes the Respondent, State of Ohio, by and through Dean P. Mandross, Assistant Prosecuting Attorney of Lucas County, Ohio, and respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Supreme Court of Ohio.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE PETITIONER HAS FAILED TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Supreme Court of the United States, pursuant to 28 U.S.C. Section 1257(3) has jurisdiction to review cases in state courts by way of certiorari in three situations: (1) where the validity of a federal treaty or statute is drawn in question; (2) where the validity of a statute is drawn in questioning the ground of its being repugnant to federal law; and (3) where a title, right, privilege, or immunity is set up or claimed "under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is fundamental to the jurisdiction of the Supreme Court pursuant to Section 1257 that there must be presented a substantial federal question and that the question has been properly raised in the state court proceeding. The federal question presented must be more than a formal one and must not be so devoid of merit as to be frivolous. Nor can it be foreclosed by prior decisions of the Supreme Court so that there is no real controversy. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308 (1902). Any federal issue not meeting these standards is considered insubstantial and is cause for dismissal of an appeal or a denial of a petition for writ of certiorari. *Zucht v. King*, 260 U.S. 170 (1922); *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390 (1951).

The issues raised by the Petitioner fail to meet the requirement of a substantial federal question. There is no new or novel constitutional question presented and the case will affect few individuals, if any, other than the Petitioner.

II. THE PETITION FOR CERTIORARI SHOULD BE DENIED FOR THERE IS AN ABSENCE OF A LEGAL CONTROVERSY.

The Supreme Court generally will not grant certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved. In *United States v. Johnson*, 268 U.S. 220, 227 (1924), the Court held, "We do not grant certiorari to review evidence and discuss specific facts".

This policy has most often been followed in cases such as this one where two separate appellate courts have concurred regarding the sufficiency of the facts.

As stated in *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1948):

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.

Petitioner seeks to have this Court make a review directly contrary to the holdings of *Johnson* and *Linde Co., supra*. Petitioner would have this Court believe that the victim was five (5) years old (Petitioner's Writ, pages 1A, 1B, 16), when in fact he was seven (7). Additionally, Petitioner bastardizes the facts in arguing that the victim "wasn't sure defendant did anything."

The evidence at trial showed that the Defendant touched the genitals of a seven (7) year old boy, for the purpose of sexual gratification. The evidence showed that the Defendant had developed a scam wherein he would purportedly assist young children in using the restroom facilities and that while tucking in their clothing, Defendant would take that opportunity to touch and feel their genitals.

Antonio Hernandez testified that on the date in question he was at the Northtowne Mall with his mother, father, and younger brother. While at the mall they stopped to have lunch at McDonalds. Antonio testified that while the rest of his family was ordering food, he went to use the restroom facilities.

The restroom at McDonalds was described as having two (2) separate rooms. The first room, contained the sink and an electric hand dryer. The second room, which was separated from the first by a solid door, contained two (2) urinals and a toilet facility. Antonio testified that while in the restroom, the Defendant was also present.

The victim went on to describe the actions of the Defendant-Petitioner, wherein he pulled Antonio's pants down and purportedly attempted to assist Antonio in using one of the urinals by lifting him up. Antonio testified that he pulled his pants up and told the man that he didn't have to use the facilities. After being set down, Antonio tried to get into the toilet stall but the door was stuck. The Defendant opened the door and again pulled Antonio's pants down a second time and watched while Antonio used the facilities. Antonio then left this portion of the restroom and entered the sink area.

It was at this time that Mr. Hernandez entered the restroom along with his youngest son. Mr. Hernandez recalled that as Antonio came out of the urinal area, he was closely followed by the Defendant. Antonio went on to testify that while at the sink, and while attempting to wash his hands, the Defendant pulled his pants down for a third time and under the guise of tucking in his shirt, touched his penis and butt. Mr. Hernandez, who was in the second room of the restroom, testified that while

keeping an eye on his youngest son he leaned against the door to the sink area to check on his eldest son, Antonio. Mr. Hernandez testified that while so doing, he saw the Defendant's hand in his son's pants.

Mr. Hernandez testified that he closed the door momentarily to gather up his youngest son and that when he looked back into the sink area for a second time, the Defendant had left. Mr. Hernandez went on to decribe the reaction of his eldest son, who had rushed up to his father in an excited state with his face flushed and ears red, and recounted how his son had told him that the man who had just left had fondled his son's privates.

Mr. Hernandez immediately took his boys from the restroom area and left them with their mother while he searched for the Defendant. His search was unsuccessful and Mr. Hernandez testified that he returned to McDonalds and reentered the restroom as he had to use the facilities himself. While drying his hands, Mr. Hernandez noted that the Defendant reentered the restroom a second time, looked into the urinal area of the restroom and immediately left. Mr. Hernandez testified as to his efforts in following the Defendant, stopping him, and calling the authorities to speak with the Defendant.

The Petitioner took the stand and testified in his own behalf. The Petitioner, while admitting he did have his hands in the boy's pants, denied that he touched the boy's genitals and indicated that he was only trying to tuck the boy's shirt in. The Petitioner testified that he went to the mall specifically to pick up a screen door at Montgomery Wards, however he failed to adequately explain why he parked two-hundred (200) feet away from

Montgomery Wards and entered the mall through the McDonalds entrance. Moreover, he denied entering the restroom a second time and testified that both Mr. Hernandez and Mrs. Hernandez were lying about seeing him leave the restroom a second time.

Petitioner takes a portion of the victim's testimony out of context in a vain attempt to suggest that the victim testified that he really doesn't know what happened. Mr. Hernandez had described how his son had run up to him in an excited state and told him how the Defendant had touched his penis. Mr. Hernandez recounted that his son had gestured by waving his hand back and forth when describing what the Defendant had done to him (TR. 45). During Antonio's testimony the State attempted to have the seven (7) year old victim testify to exactly how he had described these events to his father.

> Q: (Mr. Mandross) Antonio, I'm not clear on something, and maybe you can help me with this. When you said that the man touched your penis—
>
> A: (Nodded affirmatively).
>
> Q: (Continuing)—can you tell me in a little more detail what exactly he did? Can you use your hand to show me?
>
> Mr. Newcomer: Objection, Your Honor. Can we approach the bench?
>
> The Court: Yes. (Thereupon, an off-the-record discussion was had at the Bench.)
>
> The Court: Objection is sustained.
>
> Q: (Mr. Mandross) Antonio, help me out there, can you?
>
> A: I'm not sure. I don't really know.

Q: Well, do you remember telling your dad what the man did?

A: Yes.

Q: What—how did you explain it to your dad?

A: I told him that he did it, but really, I really don't really know.

Q: You can't really describe it in more detail how he touched you?

A: (Indicated negatively)

As the Court can see from this exchange the child was testifying that he can't recall how he explained it to his father, not that he doesn't know what happened to him.

Moreover, counsel takes exception to Petitioner's claim that the prosecutor gave "hand signals" to the victim. The record is totally void of such evidence inasmuch as it did not take place.

A. Question Regarding Polygraph Was Not Prejudicial Or Erroneous.

Petitioner argues that the trial Court should have granted his motion for a mistrial because the State of Ohio on two (2) separate occasions improperly asked questions regarding the Defendant's willingness or unwillingness to take a lie detector test. It must be stressed that while the issue of a lie detector test was twice mentioned during the course of this trial the State was not directly responsible for the first occurrence. The evidence will show that while the State did bring up the issue the second time that it was justified in doing so.

The first mention of this procedure arose during the testimony of the victim's father, Mr. Gaspar Hernandez. During part of Mr. Herdandez's testimony the State tried to narrow into a particular statement of the Defendant by asking the following question:

> Q: Was there a point in time while you're in this hallway where he changes his story or admits to doing other things? (TR. 54).

At this point defense counsel makes the following objection:

> Mr. Newcomer: Objection. He can ask what what he stated. He's characterizing it. He can ask what the conversation was.
>
> The Court: I'm not sure that I understand the distinction.
>
> Mr. Newcomer: He is characterizing the testimony right now, and I think that he should just ask the question as to what was said.
>
> The Court: All right. (TR. 54).

As a result of defense counsel's objection, the State phrased the question as defense counsel requested:

> Q. Tell the jury what else Mr. Tillimon said during the course of the conversation with you and the officer? (TR. 54).

It is at this point, in answer to the above question, that Mr. Hernandez included in his response the statement of the Defendant indicating that he wouldn't take a polygraph unless Mr. Hernandez also took one.

The above readily shows that the State did not intentionally elicit testimony about this polygraph procedure. The State had attempted to narrow its questioning to elicit testimony on a different subject. It was only in response to defense counsel's objection that

the State was forced to ask the much more broad and open ended question in which Mr. Hernandez recounted the Defendant's statements about the polygraph examination. As such, the State cannot be held responsible for the above testimony.

Moreover, the Court granted defense counsel's motion to strike the testimony and properly instructed the jury to disregard reference to the polygraph test (TR. 55, 56).

However, during the course of the cross examination of the Defendant, this topic was raised by the State of Ohio. It is critical that this Court understands the context in which this subject was raised. During the course of the Defendant's direct examination, his attorney elicited testimony to the effect that the Defendant, on the evening after this occurrence, composed a written statement as to everything that occurred while at the mall. It was further testified, that this statement was given to the authorities including the prosecution:

> Defendant: What I did? I went home that night and I wrote down everything that happened to me from the time of the incident until that time.
>
> Counsel: O.K. And do you recall whether or not that particular information was ever given to anyone?
>
> Defendant: Yes.
>
> Counsel: Who was it given to?
>
> Defendant: Immediately after I wrote it?
>
> Counsel: Just who ever.
>
> Defendant: We interviewed three (3) attorneys, including yourself, and we gave each attorney a copy of my statement.

Counsel: Now, a copy of this was also—was a copy of this also given to the prosecution?

Defendant: Yes.

Counsel: Alright. *And they have a copy in their possession*?

Defendant: Yes. (TR. 234, 235).

This ploy by defense counsel was an attempt to improperly bolster the Defendant's credibility. The obvious inference to be drawn from this testimony was that if the Defendant wrote down everything that happened, gave that information to the prosecution and the State offered no evidence to rebut the contents of this statement, that the statement must be true and thus the Defendant must be being truthful. In point of fact the Defendant's written statement contained "facts" which the State could prove were not true. Moreover it must be stressed that it was the Defendant who brought the issue of the contents of this statement before the jury.

During cross-examination, the State of Ohio endeavored to show that the written statement of the Defendant was inaccurate and self serving. The start of this line of questioning is reflected on page 246 of the trial transcript wherein the Defendant acknowledged that he made a conscious effort to write down everything that happened as best as he could recollect it.

The State initially asked questions to emphasize that this written statement did not actually include some important facts:

Q: Mr. Mandross. Show me—point out in there where you wrote down how you were waiting in line to order a coke.

A: I don't write that down specifically. I say a man approached me in the restaurant.

After bringing out certain inconsistencies, the State then asked:

> And it is your testimony that in the presence of Mr.—or Officer Holt, you indicated that you would take a lie detector test, or there was some talk about taking a lie detector test? (TR. 252).

The purpose of this question, as indicated during the in chambers discussion between the Court, defense counsel and State, was to point out an additional false statement which was included in Defendant's supposedly accurate written statement of what had occurred on this day. The State's Exhibit 11 (Defendant's written statement) reflects that the Defendant wrote, in his own hand, "the officer said to me, will you take a lie detector test? I said, yes." As the State indicated in its proffer for the record, it would have been Officer Holt's testimony that he (Officer Holt) never asked anyone to take a lie detector test (TR. 263). The obvious purpose for the State's question was to point out that the Defendant was making false and self serving statements. This question was designed to rebut the inference created by defense counsel's questioning regarding this "supposedly" accurate written statement made by the Defendant. Thus, the State was attempting to fulfill the basic premise of cross-examination; to attack this declarant's credibility by showing that he has made false statements.

The Defendant attempted to create the false impression with the jury that he had openly and honestly outlined the entirety of the situation and provided same to the prosecution. Though many of his "facts" in this written statement were false, he now argues that the State should be foreclosed from displaying these deceptions to the jury. The United States Supreme Court has long recognized that a

Defendant "has no right to set forth to the jury, all the facts which tend in his favor without having himself open to a cross-examination upon those facts." *Fitzpatrick v. United States,* 178 U.S. 304, 315 (1900). Moreover, this Court has stated "that unless prosecutors are allowed wide leeway in the scope of impeachment cross-examination, some Defendant's would be able to frustrate the truth searching function of a trial by presenting tailored defenses insulated from effective challenge. *Doyle v. Ohio,* 426 U.S. 610 (1975) [at footnote seven (7)]. Again, this is precisely what the Defendant sought to accomplish. The fact that one of the false statements concerned a polygraph examination should not have foreclosed the State from asking questions regarding that fact. It must be emphasized that the State asked "whether there was some talk about taking a lie detector test." (TR. 252). As the State indicated to the trial Court, it was not asking whether the Defendant took the test or not, nor was it interested in the results of any supposed test. The purpose of the question was to set a foundation to show that the Defendant had made false comments in his written statement (TR. 256).

Moreover, Ohio Rule of Evidence 611 states: "cross-examination shall be permitted on all relevant matters and matters affecting credibility." Clearly proof that the Defendant has made written statements which are false goes to his credibility. As Petitioner's counsel repeatedly points out, this is a case in which the credibility of the Defendant is paramount. Thus, proof that he has made false statements constitutes relevant and admissible evidence in this matter. Moreover, it has long been the law in Ohio and other jurisdictions that a witness can be cross-examined with reference to a written statement previously made and signed by him concerning the facts under investigation. *Babitt v. Say,* 120 Ohio St. 177 (1929).

Such questioning was proper and made in good faith by the State of Ohio as evidenced by its proffer. Moreover, the Court sustained the defenses' objection, and gave a lengthy curing instruction, in which the jury was told to disregard any reference to the polygraph examination (TR. 254). Thus, the Defendant was not prejudiced.

A case that should provide guidance for this Court is *State v. Holt*, 17 Ohio St. 2d 81, 46 O.O. 2d 408 (1969). Appellant Holt claimed prejudicial error on the part of the trial judge for not ordering a mistrial pursuant to his motion when the State's witness testified that the Defendant had taken a lie detector test and failed it. The Ohio Supreme Court in acknowledging that such testimony was "no doubt damaging to the defendant" stressed that the trial Court promptly instructed the jurors to disregard such testimony. The Ohio Supreme Court then held "in view of the Court's immediate action in this respect, we do not feel justified in holding that the judge's refusal to order a mistrial was prejudicial error." Thus if the Ohio Supreme Court found that testimony referring to the fact that a Defendant took and failed a polygraph test does not warrant a mistrial in light of a trial Court's limiting instruction, then certainly this trial Court was not in error in refusing to grant a mistrial when there was no testimony as to the Defendant failing to pass a polygraph test. This is especially true since the State had a legitimate basis in asking the question.

Additionally, none of the cases cited by the Petitioner are factually relevant. The question posed by the State was:

> "You indicated that you would take a lie detector test, or there was some talk about taking a lie detector test?"

Cases cited by Petitioner all involve evidence that the accused took a polygraph (*United States v. Brevard*, 739 F.2d 18) or refused a polygraph (*State v. Kolander*, 52 N.W.2d 458, etc.). This is not the situation before this Court.

In conclusion, the State's original question had nothing to do with the results of any polygraph test. The question was asked to attack the Defendant's credibility and to rebut the false inference that the Defendant had been completely open and honest with the authorities.

It must be stressed that it was the defense which raised the issue of the written statement. Though obviously aware of its contents, the defense never requested a motion in limine. This raises the issue as to whether the defense sought to create a mistrial knowing the State would raise the polygraph issue since it was a fabrication on the Defendant's part.

Finally, the Defendant was not prejudiced in light of the Court limiting introduction and the fact that no reference was made as to whether any such test was ever taken.

CONCLUSION

Based upon the aforementioned law and the facts of the case, none of the issues raised by the Petitioner should be reviewed by this Court. The State of Ohio would respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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